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Bankruptcy--Rights of Trustee--Unliquidated Cause of Action for Personal Injury [*Haynes v. Public Fin. Corp.*, 7 Ohio App. 2d 89, 218 N.E.2d 727 (1966)]

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practical worth of these suggestions is uncertain; however, in light of the instant case, it is obvious that a physician must do more than rely on a general consent form⁴⁴ if he is to protect himself from potential lawsuits based upon the premise that the patient had no "true understanding of the operation to be performed."

FREDERIC C. BOWER

BANKRUPTCY — RIGHTS OF TRUSTEE — UNLIQUIDATED CAUSE OF ACTION FOR PERSONAL INJURY

Haines v. Public Fin. Corp., 7 Ohio App. 2d 89,
218 N.E.2d 727 (1966).

Prior to the amendment of the Bankruptcy Act in 1938,¹ a vast majority of jurisdictions, including Ohio,² would not allow unliquidated tort claims to pass to the trustee.³ The amendment attempted to negate the possibility that courts would exclude such causes of action from the category of "property" rights by including rights of action for personal injury as a form of property which would vest in the trustee if such rights were subject to state "attachment, execution, garnishment, sequestration, or other judicial process."⁴

The recent decision in *Haines v. Public Fin. Corp.*⁵ is to be regarded as the present Ohio law with respect to the trustee's right to a debtor's cause of action for a personal injury claim. In *Haines*, the plaintiff claimed damages for an alleged invasion of her right of privacy, but she filed a petition in bankruptcy before trial. The defendant alleged that the trustee in bankruptcy was the proper party to bring suit since the plaintiff was no longer the owner of the claim. The court was thus presented with the question of a trustee's right to the debtor's unliquidated personal injury claim as opposed to the ownership of the claim by the debtor. The court held that a personal injury claim based upon the invasion of a right of privacy is a chose in action and is not vested in the trustee in bankruptcy because such a claim does not meet the statutory requirements for attachment or garnishment.⁶ The property need

⁴⁴ General consent forms have not provided the physician with any substantial measure of protection against liability. They are considered so ambiguous as to be completely worthless, since the exact nature of the operation is never stated. *E.g.*, *Danielson v. Roche*, 109 Cal. 2d 832, 241 P.2d 1028 (1952).

not be tangible or physical, but it must be capable of valuation or appraisal.⁷ Insofar as attachment and garnishment are concerned, unliquidated tort claims are not subject to these judicial processes.⁸

It appears that under Ohio precedent and statutory construction, the court was correct in its determination that creditors cannot reach the debtor's unliquidated personal injury claims via the attachment and garnishment statutes. Although it might be contended that statutes pertaining to attachment are remedial in nature and should be liberally construed,⁹ it is generally recognized that a strained construction should not be given them.¹⁰ In *Squair v.*

¹ 52 Stat. 879, as amended, 11 U.S.C. § 110 (1964) [hereinafter cited as 1938 Act].

² *Friedman v. Myers*, 30 Ohio C.C. Dec. 303 (1907).

³ 4 COLLIER, BANKRUPTCY § 70.28, at 1248 (14th ed. 1964). One rationale to defeat the trustee's claim was based on social policy: the debtor should be the owner of the cause of action since the action was too personal in nature, and the injured party should be made whole by recovering a judgment. See *Sibley v. Nason*, 196 Mass. 125, 130, 81 N.E. 887, 889 (1907). Other cases such as *Ruebush v. Funk*, 63 F.2d 170, 172 (4th Cir. 1933) applied an *expressio unius est exclusio alterius* construction to the Bankruptcy Act to achieve the same result. 1938 Act § 70(a) (5), (6), 52 Stat. 879, as amended, 11 U.S.C. § 110 (1964), provided that assets which would vest in the trustee included "(5) property which prior to the filing of the petition he [the bankrupt] could by any means have transferred or which might have been levied and sold under judicial process. . . . (6) rights of action arising upon contract or from the unlawful taking or detention of, or injury to, his property."

⁴ 1938 Act § 70(a) (5), 52 Stat. 879, as amended, 11 U.S.C. § 110 (1964). The 1938 Act provides that the trustee in bankruptcy shall be vested by law in property, including rights of action, which prior to the filing of the petition he [the bankrupt] could by any means have transferred or which might have been levied upon and sold under judicial process against him, [the bankrupt] or otherwise seized, impounded, or sequestered: *Provided*, That rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process *Ibid*.

⁵ 7 Ohio App. 2d 89, 218 N.E.2d 727 (1966).

⁶ *Id.* at 92, 218 N.E.2d at 728. The statutes which the court examined were OHIO REV. CODE § 2715.01, which states that "property" may be attached, and OHIO REV. CODE § 2715.05, which requires the sheriff "to attach the lands, tenements, goods, chattels, stocks or interest in stocks, rights, credits, money, and effects of the defendant." The appellant contended that "property" within § 2715.01 encompassed personal injury "rights," since "rights" were specifically included within § 2715.05. In addition, the appellant argued that the term "property" included everything which one person can own and transfer to another. See Brief for Appellant, p. 14, *Haines v. Public Fin. Corp.*, 7 Ohio App. 2d 89, 218 N.E.2d 727 (1966), citing 44 OHIO JUR. 2d *Property* § 4, at 240 (1952).

⁷ 7 Ohio App. 2d at 92, 218 N.E.2d at 728.

⁸ *Id.* at 92, 218 N.E.2d at 729, citing 6 AM. JUR. 2d *Attachment and Garnishment* § 132, at 654 (1963).

⁹ *Hart v. Andrews*, 103 Ohio St. 218, 132 N.E. 846 (1921); *Weirick v. Mansfield Lumber Co.*, 96 Ohio St. 386, 117 N.E. 362 (1917).

¹⁰ 5 OHIO JUR. 2d *Attachment* § 7, at 431 (1954).

Shea,¹¹ the supreme court noted that creditors could not reach the debtor's rights or claims against others for tort damages by the attachment process. Further, in *Union Properties, Inc. v. Patterson*,¹² the court stated that "the action in garnishment is one in law by which a creditor seeks satisfaction of the indebtedness out of an obligation *due* the debtor from a third person."¹³

The most interesting aspect of the *Haines* case is the failure of the parties to raise, and the court to consider, the issue of Ohio's statutory creditor's bill.¹⁴ The cases indicate that a creditor may utilize this statutory remedy to reach the unliquidated personal injury claim. In *Cincinnati v. Hafer*¹⁵ the supreme court stated as the primary issue whether an unliquidated cause of action for nuisance against property was of such a nature that a judgment creditor of the plaintiff could acquire a lien on the demand.¹⁶ The court held that such a creditor could acquire an equitable lien on the debtor's cause of action for damage to property from the commencement of his suit.¹⁷

The court also considered the question whether a tort action is a "chase in action" within the intent of the creditor's bill statute.¹⁸ As its test, the court noted that any claim which will survive or is transmissible to an executor or administrator under the survival statute¹⁹ is assignable in equity and thus will be considered a property right subject to the payment of a debt.²⁰ The court held that an action involving an injury to land was assignable and therefore subject to the creditor's lien, unlike "mere personal torts which die with the party."²¹

¹¹ 7 Ohio Dec. Reprint 71 (Super. Ct.), *rev'd on other grounds*, 26 Ohio St. 645 (1876).

¹² 143 Ohio St. 192, 54 N.E.2d 668 (1944).

¹³ *Id.* at 195, 54 N.E.2d at 670. (Emphasis added.)

¹⁴ OHIO REV. CODE § 2333.01 is a statutory enactment in the nature of a common law creditor's bill. It provides in part:

When a judgment debtor does not have sufficient personal or real property subject to levy on execution to satisfy the judgment, any equitable interest which he has in real estate . . . or in money contract, *claim*, or *chase in action, due or to become due* to him . . . shall be subject to the payment of the judgment by action. (Emphasis added.)

¹⁵ 49 Ohio St. 60, 30 N.E. 197 (1892).

¹⁶ *Id.* at 64-65, 30 N.E. at 198.

¹⁷ *Id.* at 67, 30 N.E. at 198; Fornoff, *Creditor's Bills*, 16 OHIO ST. L.J. 32, 48 (1955).

¹⁸ REV. STAT. § 5464. The statute is identical to OHIO REV. CODE § 2333.01.

¹⁹ REV. STAT. § 4975.

²⁰ 49 Ohio St. at 66, 30 N.E. at 198. See Fornoff, *supra* note 17, at 48.

²¹ *Id.* at 66, 30 N.E. at 198. See note 25 *infra* and accompanying text.

There is language in the opinion which suggests that the survival-assignability test is not exclusive and that, even in the year of the *Hafer* decision, personal injury rights could be reached by the creditor's bill.²² In *Strouss-Hirshberg Co. v. Davidson*,²³ the Mahoning County Court of Appeals considered the *Hafer* decision and awarded a judgment creditor a lien against a debtor's unliquidated cause of action for personal injury. The court did not apply the survival-assignability test but did rely upon the broad language in *Hafer* as authority for its ruling.²⁴ As one writer has suggested, the *Hafer* test would now allow creditor's bills to reach unliquidated personal injury claims since the new survival statute²⁵ embraces injuries to the person.²⁶

Even if an unliquidated personal injury claim can be reached by a creditor's bill, it is necessary to show that this remedy can be considered a "judicial process" so that the cause of action would vest in the trustee. It is quite possible to consider the statutory creditor's bill as equitable in nature since it can reach property which cannot be reached by ancillary proceedings in aid of execution such as attachment or garnishment.²⁷

If a property right can be reached at law, it might not be subject to a creditor's bill in equity.²⁸ On the other hand, it has been said that the proceedings under the statutory creditor's bill are really not different from those at law. Under the original equity jurispru-

²² Although the court would negate a personal injury claim by applying the survival-assignability test, it was pointed out: "while by a chose in action is ordinarily understood a right of action for money arising under contract, the term is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong inflicted on person or property." 49 Ohio St. at 65, 30 N.E. at 198. The court also noted that the word "claim" in § 5464 (OHIO REV. CODE § 2333.01) embraces demands for damages to person or property. 49 Ohio St. at 67, 30 N.E. at 199.

²³ 19 Ohio L. Abs. 225 (Cir. Ct. App. 1935).

²⁴ *Id.* at 226-27. It may well be contended that the language of *Hafer* upon which the court in *Strouss-Hirshberg* relied was dicta in the former case. Although the latter case may have utilized the wrong theory to achieve the correct result, it has not been overruled and must be considered as good law today. Moreover, the *Strouss-Hirshberg* decision could have reached the same result by applying the *Hafer* test. In the year of its decision, the new survival statute was in effect. See note 25 *infra* and accompanying text.

²⁵ OHIO REV. CODE § 2305.21 provides in part, "In addition to the causes of action which survive at common law, causes of action for . . . injuries to the person or property . . . shall survive."

²⁶ Fornoff, *supra* note 17, at 49.

²⁷ See *Alms & Doepke Co. v. Johnson*, 98 Ohio App. 78, 83-84, 128 N.E.2d 250, 253 (1954); *Union Properties, Inc. v. Patterson*, 143 Ohio St. 192, 195, 54 N.E.2d 668, 670 (1944).

²⁸ 14 AM. JUR. *Creditors' Bills* § 45, at 702 (1938).

dence, before a creditor's suit it was necessary for the creditor to exhaust his remedies at law, whereas under the statute a creditor's bill can be utilized even if there is an adequate legal remedy.²⁹

If it is conceded that this statutory remedy is different from the proceedings in aid of execution, the contention can be made that the 1938 amendment to the Bankruptcy Act recognized the dissimilarity and expressly excluded statutes which provide for an equitable remedy. A proponent of this view would note that the amendment suggests that the mere transferability of a right of action for personal injury is not such a property right as would accrue to the trustee.³⁰ To make more certain that a judicial process which utilizes transferability as its test would be excluded, the proviso, unlike the general clause, specifically enumerates types of procedures, and they are unlike the Ohio statutory remedy. Hence, an *ejusdem generis* construction of the act would not permit the trustee to acquire the debtor's cause of action even if a creditor were granted an equitable lien under state law.

As sound as this theory may appear to be, the weight of authority nevertheless implies that an equitable proceeding, although it may give the creditor greater protection, should be considered as within an *ejusdem generis* construction of the act so as to vest the cause of action in the trustee. At least one writer suggests that section 70(a)(5) should be construed *in pari materia* with section 70(c) of the act.³¹ Under this interpretation, the trustee would acquire property which a creditor might reach by equitable proceedings.³²

In addition, the decisional law of other jurisdictions indicates that equity-type statutes should be applied to the amended act.³³ Although these authorities do not specifically consider the statutory

²⁹ See 15 OHIO JUR. 2D *Creditor's Suits* § 14, at 160-61 (1952).

³⁰ COLLIER *op. cit. supra* note 3, § 70.28, at 1250.

³¹ 1938 Act § 70(c), 52 Stat. 879, as amended, 11 U.S.C. § 110 (1964) provides: "The trustee, as to all property in the possession or under the control of the bankrupt . . . shall be deemed vested . . . with all the rights, remedies, and powers of a creditor then holding a lien thereupon by legal or equitable proceedings." (Emphasis added.)

³² COLLIER, *op. cit. supra* note 3, § 70.04, at 957.

³³ In *McNeilly v. Furman*, 47 Del. 565, 575, 95 A.2d 267, 271 (1953), the court stated that although the applicable statutes provided for the seizure of any "property," "we can find no instance where process in equity has been used to sequester such a claim." In *Carmona v. Robinson*, 336 F.2d 518 (9th Cir. 1964), a federal court read § 70(a)(5) of the act together with § 70(c). A California statute permitted a judge, in his discretion, to give a creditor a lien on a debtor's unliquidated cause of action for personal injury. The court held that such a lien could be properly granted, and by operation of law this property right would vest in the trustee.

creditor's bill, they do suggest that if a creditor has any statutory means of reaching the debtor's cause of action, the trustee in bankruptcy would likewise have the statutory remedy. An anomalous situation would arise if the statutory remedy were available only to the judgment creditors and not to the trustee; the trustee would then be denied his status of a preferred creditor contrary to the spirit of sections 70(a)(5) and 70(c) of the act.

It therefore appears that the court of appeals should have considered the Ohio creditor's bill in order to apply properly section 70 of the act in the *Haines* case. Since Ohio precedent indicates that a creditor can reach an unliquidated cause of action for personal injury, and since section 70 would vest this right to the trustee in bankruptcy, the case might have been decided in the appellant's favor.

Although the *Haines* court did not expressly rule out the theory that creditors could, through a creditor's bill, reach an unliquidated cause of action for personal injury, its silence on the issue suggests this possibility. Since the equity-type statutes are to be considered when section 70 of the act is applied in factual situations similar to that in *Haines*, the case may well be cited as authority for the proposition that creditors in Ohio cannot reach the cause of action under discussion by either legal or equitable proceedings. If the decision is interpreted this broadly by future courts, it will conflict with *Strouss-Hirshberg Co. v. Davidson*,³⁴ decided by another court of appeals, and the Ohio law in this area could not be considered uniform.

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³⁴ 19 Ohio L. Abs. 225 (Cir. Ct. App. 1935).